AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

2 February 2020

ACCC's Consultation on how best to facilitate participation of third party service providers

By email: ACCC-CDR@accc.gov.au

Thank you for the opportunity to provide a submission in response to the ACCC's consultation on facilitating participation of intermediaries in the CDR regime.

As you will be aware, ARCA is the peak industry association for businesses using consumer information for risk and credit management. In addition to our credit provider Members, the three national credit reporting bodies (CRBs) are ARCA Members. CRBs already provide important intermediary services in the credit industry using credit reporting data, and will potentially extend this role using CDR data (although, given the regulatory framework, the services will be offered through different entities than their credit reporting businesses). In addition, ARCA has a number of Associate Members who are likely to act as intermediaries in respect of CDR data. Many of our credit provider (CP) Members will likely also utilise the services of intermediaries, and hence the importance of the CDR rules for intermediaries has widespread importance for our industry.

i. Summary

The rules to facilitate the intermediary services need to be designed in a flexible manner that recognises – and does not overly interfere with – the way commercial relationships between the intermediary and the client are structured and how the broad range of services are supplied to clients.

Importantly, the rules should recognise and allow for a flexible and pragmatic approach to be taken to accreditation. As noted in the consultation paper, the use of an accredited intermediary could facilitate entry into the CDR regime of data recipients with a lower tier of accreditation. However, we would go beyond that to recommend that the use of an accredited intermediary should, in appropriate circumstances, allow the client to use the services of an intermediary without the need to hold accreditation – illustrated by the broker example below.

Further, the rules should recognise that the opposite situation may also occur; the client may hold the accreditation and the "intermediary" may not (particularly where that intermediary may be a smaller, FinTech or RegTech provider). While the rules currently contemplate a form of outsourcing relationship under which the outsource provider does not require accreditation, the limitations and conditions of those rules will limit the use of such FinTech and RegTech providers.

In addition:

- The way in which the rules should deal with intermediaries is a complex question and we note that draft rules are expected to be released by March 2020. We are concerned that, in drafting the rules, the ACCC will make firm policy decisions that have not been informed by a proper consultation process. While the current consultation process is a good start, it is difficult to provide proper feedback in the absence of any proposed 'framework' (noting that the current consultation questions are very broad and suggest a 'fact-finding' exercise rather than consultation on policy proposals). While recognising the need to develop the intermediary rules quickly, we strongly recommend that the ACCC take a similar approach to the primary rules and release a 'rules framework' prior to drafting rules to allow stakeholders to provide additional feedback prior to firm policy decisions being made. In order to expedite the process, we would recommend release such a framework and then conducting a series of roundtables with interested stakeholders.
- We note that the use of intermediaries for credit-related purposes will require regulations to be made under Part IIIA of the *Privacy Act* to exclude those activities from the definition of "credit reporting business" (which will ensure those intermediaries will not be regulated as credit reporting bodies). Subject to those regulations, the CDR rules should provide further clarity regarding the treatment of derived data that is both CDR data and credit eligibility information (as that term is used in the Privacy Act). This is an example of where it is not possible to provide detailed feedback without knowing how the rules will be broadly structured.
- We recommend that certain elements of the foundational rules be reconsidered as they are not consistent with how data is likely to be used in practice. In particular, we note that the data minimisation principle in rule 1.8 appears to prevent the use of CDR data for the purposes of creating and optimising algorithms, such as those used in credit scoring (i.e. the use of the data for the purpose of creating and optimising algorithms that will be used to provide credit to other consumers arguably goes beyond "what is reasonably needed in order to provide the requested goods or services" [emphasis added][1]). Likewise, the rules relating to the consent process and data de-identification and destruction process are not consistent with how data is used in practice. We note that this issue goes beyond the question of intermediaries and we would be happy to discuss it in further detail.

1. Description of the goods or services provided by intermediaries in relation to credit management

[1] We note that the Explanatory Statement to the CDR Rules appears to take a very broad view of what is "reasonably needed in order to provide the requested goods or services". The Explanatory Statement (in paragraph 1.105) refers to an accredited data recipient making a request for the consumer's consent to "sell their de-identified data in order for the consumer to receive the good or service provided by the accredited person free of charge". This appears to suggest that this use in within the data minimisation principle. We question whether this is correct as it would require the data minimisation principle to be read as "reasonably needed in order to provide the requested goods or services *on particular terms*". Even assuming if it can be so read, this would not extend to the creation and optimisation of scoring algorithms as those activities have nothing to do with the credit provided to the immediate customer (and only relate to future customers).

Intermediaries already exist in relation to credit management and provide services to credit providers and brokers that help those businesses meet their regulatory and commercial needs.

These services typically involve one or a combination of:

- Collection – this would involve tapping into the data source. Currently that may include collecting data via digital data capture (sometimes referred to as 'screen scraping'). In the future, it will include accessing the data via the APIs being developed.
- Aggregation – this would involve, for example, combining the data into meaningful categories and is likely to involve some analysis of the data (although to a lesser degree than described next). For example, the provider may categorise the consumer's line-by-line transaction data into various expense-type buckets for the purposes of assessing whether a consumer can afford a loan.
- Analysis – this would involve, for example, calculating a credit risk score based on the data that has been collected and aggregated on behalf of the credit provider. We note that this activity would potentially be subject to Part IIIA of the *Privacy Act* if the activity amounted to acting as a 'credit reporting business'. Depending on the business model, and the regulatory framework, this service could be done by the intermediary or by the credit provider using the scoring algorithm provided by the intermediary (using the credit provider's own data and data received through other sources, such as credit reports, digital data capture and, in the future, the CDR Rules).

We've set out an example below of how this could work in practice. However, we note that there are many alternatives that could result in different process flows.

- Customer approaches Broker for help to obtain a home loan.
- In order to meet their responsible lending obligations, Broker collects information directly from Customer and from a credit reporting body (i.e. as an access seeker under Part IIIA). Broker also uses the services of Data Aggregator to obtain information about Customer's expenses.
- Broker sends Customer to Data Aggregator's website. (Alternatively, the Broker could send Customer to Broker's website, which redirects to the Data Aggregator's website; potentially using the branding of the Broker.)
- Data Aggregator obtains Customer's consent[2] and details of Customer's banking relationships. (Alternatively, the Broker could obtain the consent.)
- Data Aggregator uses the services of a separate Data Collector to tap into the data source – depending on the circumstances, this could include obtaining data under the CDR Rules or through digital data capture.
- Data Aggregator analyses the data in order to categorise the transactions into expense-types and passes that aggregated data back to the Broker to help with their responsible lending assessment.
- Data Aggregator retains a de-identified copy of the data to help it improve its expense categorisation processes.
- Broker determines that they need to 'deep dive' into a particular expense-type and looks at the underlying transaction data.

[2] We discuss the process of obtaining consent in further detail in (4).

- The data is also sent to the Broker's Broking Aggregator for the purposes of auditing the Broker's conduct and for other. Depending on the purpose, this could be identified or de-identified data.
- Broker recommends a loan from Bank and provides Bank with access to the aggregated expense-type data and the transaction-level data.
- Bank uses the data to meet its responsible lending obligations and also to assess the credit risk of Customer. As part of this, Bank sends the data plus its own data on Customer (who has a credit card with Bank) plus credit reporting data to Scoring Business to calculate a credit score for the Customer.
- Bank retains an identified version of the data for its auditing and regulatory purposes. It also retains a de-identified copy to help improve its own credit risk processes.
- Scoring Business retains a de-identified copy of the data to help it improve its scoring model, which may be combined with data that it has received from other lenders.

In the above situation, the Data Aggregator, Data Collector and Scoring Business would be intermediaries. In addition, the Broker may themselves be considered an intermediary depending on the flow of data (i.e. whether it flows from the Broker to the Bank or from the Data Aggregator to the Bank)

As you can see, there is a multitude of purposes for which the data is to be used and numerous parties to whom the data will be disclosed. Importantly, there will be a merging of data that is subject to the CDR Rules, the Australian Privacy Principles and Part IIIA.

The above process is currently permitted under the Australian Privacy Principles and Part IIIA. If the CDR Rules do not facilitate the same type of process, or place material additional regulatory hurdles in the way, it is likely that the Data Aggregator will not rely on obtaining the data under the CDR Rules and will continue to rely on other methods of obtaining the data (such as digital data capture).

Given the broad range of intermediary-type arrangements, it is difficult to comment on the different circumstances in the absence of a proposed framework. On that basis, we have limited our following comments to the above situation in which the Broker (i.e. the 'client') uses the services of the Data Aggregator (i.e. the 'intermediary'), where it is assumed that the intermediary holds full accreditation.

2. How should intermediaries be provided for in the rules (including accreditation)?

Intermediaries currently play an important role in relation to risk and credit management, and that role will only become more important as the CDR regime gives access to more data sources. Arguably, intermediaries play an even more important role for smaller lenders who may not have the resources of the larger banks to maintain the same level of internal credit capabilities.

The rules must reflect and support the wide variety of commercial relationships that exist between intermediaries and their clients, and the broad range of services that are provided – where such relationships and services may have nuanced differences between businesses.

Clearly there must be a requirement that at least one of the parties involved (i.e. client or one of the relevant intermediaries) must be accredited (which, assuming the consumer's

transactional history will be accessed, should be at the full accreditation level).[3] However, apart from that, the rules should provide for flexibility – that is, the rules should allow for various forms of both an accreditation model and an outsourcing model.

3. What obligations should apply to intermediaries?

In the above example, we would suggest that it should not necessary for the Broker to obtain accreditation provided the Data Aggregator holds a full accreditation and the terms of service require the Broker to comply with the Data Aggregator's requirements for the treatment of the data (which would reflect the requirements of the CDR Rules).

If there is a decision to require the brokers to hold accreditation in such circumstances:

- it should be at a lower level;
- be automatically granted upon application to brokers holding an Australian Credit Licence or who are credit representative of a licensee (noting that under their licence, these brokers are required to comply with the general conduct obligations under the *National Consumer Credit Protection Act*);
- require the broker to be subject to the Australian Privacy Principles (APPs), if they are not already; and
- apply the APPs to the brokers handling of the CDR data (noting that the broker will collect information about the consumer's financial situation from numerous sources, which will be combined to provide the services to the consumer and undertake the responsible lending assessment, and that it would be impractical to require the broker to isolate and treat the CDR data differently)

We note that other forms of lower accreditation may be appropriate for clients of intermediaries, or intermediaries themselves, in other circumstances.

4. How should the use of intermediaries be made transparent to consumers?

As shown in the example above, there is a multitude of purposes for which the data is to be used and numerous parties to whom the data will be disclosed – all relevant and necessary for the services requested by the consumer (i.e. first the broking services and then the provision of a loan). The current requirements relating to obtaining consent – which require consent to be itemised and allow the customer to consent on a 'data type-by-data type' and 'purpose-by-purpose' basis – will already result in confusion to consumers and be inconvenient and inefficient for many prospective data recipients. However, applying the current consent framework to the example shown above would be unworkable and would confuse and scare consumers (who are simply wanting to get a good home loan).

We recommend that the consent process in the current CDR Rules be reviewed, particularly considering the complexity of the example described above with a view to simplifying those obligations. If that is not done, as we have previously stated, we recommend that ACCC provide for 'standardised consents' for common use types such as that described above which provide a simplified, and common, form of consent.

[3] We note that question 6 asks whether the rules should facilitate lower tiers of accreditation. We agree that this will be appropriate in some circumstances. However, for the purposes of this submission, we have assumed that the consumer's full transaction history will be accessed by either the client or intermediary such that at least one party would be expected to hold full accreditation.

5. How should the rules permit the disclosure of CDR data between accredited persons?

We note that, in the example above, it would be the responsibility of the Data Aggregator to obtain the consent and otherwise comply with the requirements of the CDR Rules, which would include obtaining consent for the use and disclosure of the information to the Broker and other recipients. However, the Data Aggregator's responsibility should cease once the data has been disclosed to the Broker (which would, as described in (3), be subject to the Australian Privacy Principles in relation to the data). Again, we would recommend the use of standardised consents in relation to this example in order to simplify the message to the consumer.

6. Should the creation of rules for intermediaries also facilitate lower tiers of accreditation?

Our response to (3) sets out our views on the particular example described earlier.

Otherwise, we would support rules that facilitate lower tiers of accreditation for, as applicable, the clients of an intermediary who holds full accreditation or the intermediaries who provide services to a client who holds full accreditation.

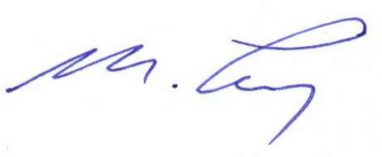
We note that the level of accreditation would depend on a consideration of the risk posed to the CDR system and to the privacy of the consumer, including:

- Whether the entity accesses the API established under the CDR Rules directly
- What data the entity will access and what restrictions are placed on that access. For example, does the entity access transaction-level data, or only aggregated data. If the entity accesses data, is there use of that data restricted (e.g. the data is held on another accredited persons system's and can only be viewed?)

As a standard approach, we would recommend that the liability framework should provide for accredited participants under the CDR Rules to retain responsibility for their own activities and compliance with the CDR Rules regardless of the level of accreditation held (noting that the commercial agreements would be able to apportion liability for non-compliance as between the intermediary and client).

If you have any questions about this submission, or would like ARCA to share any previous submission made by us in relation to the CDR framework, please feel free to contact me on 0414 446 240 or at mlaing@arca.asn.au, or Michael Blyth on 0409 435 830 or at mblyth@arca.asn.au.

Yours sincerely,



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